EXECUTIVE SECRETARIAT

ROUTING SLIP

TO:			ACTION	INFO	DATE	INITIAL
	1	DCI				
	2	DDCI				
	3	EXDIR				
	4	D/ICS				
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	6	DDA				
	7	DDO				
	8	DDS&T				
	9	Chm/NIC				
	10	GC				
	11	IG				
	12	Compt				
	13	D/OLL				
	14	D/PAO				
	15	D/PERS				
	16	VC/NIC				
	17	NIO/ECON		X		
	18	D/OGI		X		
	19	ES		X		
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	22					
		SUSPENSE Date				

Remarks

STAT

Executive Secretary

9 Dec 85

Date

3637 (10-81)

THE WHITE HOUSE
WASHINGTON

CABINET AFFAIRS STAFFING MEMORANDUM

Date: 12/5/85 **Number:** 317036CA **Due By:** _____

Subject: Cabinet Council Minutes

	Action	FYI
ALL CABINET MEMBERS	☐	☐
Vice President	☐	☑
State	☐	☑
Treasury	☐	☑
Defense	☐	☑
Justice	☐	☑
Interior	☐	☑
Agriculture	☐	☑
Commerce	☐	☑
Labor	☐	☑
HHS	☐	☑
HUD	☐	☑
Transportation	☐	☑
Energy	☐	☑
Chief of Staff	☐	☑
Education	☐	☑
OMB	☐	☑
CIA	☐	☑
UN	☐	☐
USTR	☐	☑
GSA	☐	☐
EPA	☐	☐
NASA	☐	☐
OPM	☐	☐
VA	☐	☐
SBA	☐	☐

	Action	FYI
CEA	☐	☑
CEQ	☐	☐
OSTP	☐	☐
_____	☐	☐
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McFarlane	☐	☑
Svahn	☐	☑
Chew *(For WH Staffing)*	☐	☑
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Executive Secretary for:		
DPC	☐	☑
EPC	☐	☑
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REMARKS:

Attached for your information are the minutes of the November 20, 1985 joint meeting of the Economic Policy Council and the Domestic Policy Council.

RETURN TO:

☑ **Alfred H. Kingon**
Cabinet Secretary
456-2823
(Ground Floor, West Wing)

☐ **Don Clarey**
☐ **Rick Davis**
☐ **Ed Stucky**

L-300B
XL-300A

 irector

MINUTES
DOMESTIC POLICY COUNCIL
ECONOMIC POLICY COUNCIL

November 20, 1985
1:00 p.m.
Roosevelt Room

Attendees: Messrs. Baker, Meese, Hodel, Block, Baldrige, Brock, Miller, Sprinkel, Burnley, Boggs, Bauer, Armacost, Kingon, Bledsoe, McAllister, Svahn, Brashear, Brumley, Cribb, Danzansky, Gray, Ginsburg, Holmer, Gibson, Kimmet, Muris, O'Shaughnessy, Sofaer, Stucky, and Ms. Dunlop, Ms. Risque, and Ms. Steelman.

1. Report of the Working Group on Antitrust Review

Mr. Ginsburg, Assistant Attorney General, stated that the Working Group on Antitrust Review had developed several significant proposals for amending the antitrust laws, including a proposal for detrebling antitrust judgements by amending the Clayton Act to:

1. Treble only damages caused by antitrust overcharges or underpayments, in both private and government damage cases, and provide automatic prejudgement interest on actual damages in all antitrust cases;

2. Provide an affirmative defense in all antitrust cases that would reduce the plantiff's claim for damages by the share of those damages fairly allocable to any person released from liability; and

3. Provide attorneys' fees to prevailing defendants where the plantiff's conduct is frivolous, unreasonable, without foundation, or in bad faith.

He stated that the detrebling proposal would affect not only the Clayton Act but also the Robinson-Patman and Sherman Acts. He explained that even in instances of treble damages, interest expenses would not be trebled.

The Council discussed the need to preserve incentives to settle a dispute and not encourage protracted or unwarranted claims.

Mr. Ginsburg also outlined the three options developed by the Working Group with regard to merger restrictions:

1. Propose legislation to repeal Section 7 of the Clayton Act and to substitute a monopoly standard for mergers in the Sherman Act;

2. Propose legislation to codify the policies of the Department of Justice's Merger Guidelines into Section 7 of the Clayton Act;

3. Endorse current merger enforcement policy under the Guidelines without proposing legislative action.

Mr. Ginsburg pointed out that antitrust theory and practice has become increasingly less restrictive in recent years, as evidenced by the thinking and decisions of Judges Robert Bork and Richard Posner. He noted that the Department of Justice Merger Guidelines embodied a similar approach. He explained that the Reagan Administration has brought roughly six antitrust cases per year, with most of these challenges based on actions in local markets, for example mergers of nursing homes. He also noted that the Department of Justice has focused on barriers to entry; if there are not significant barriers to entry, mergers are not restricted.

He stated that the Working Group in developing the options for the Council's consideration was concerned about future discretionary merger policy. The Merger Guidelines represent Administrative policy and are not binding on future administrations. He noted that the prospects for legislative changes in the area of antitrust are not clear, but pointed out that a House Judiciary subcommittee passed antitrust legislation last year that would have restricted horizontal or vertical mergers and restricted plant closings.

Secretary Baldrige stated that our antitrust laws must reflect that competition is occuring on a global basis, exemplified by the fact that of the fifteen major industrial corporations, only five are based in the United States. In addition, he stated that 70 percent of U.S. businesses face competition from abroad. He argued that U.S. corporations are held back in decisions regarding mergers by a lack of certainty regarding merger policy. He also pointed out that the Department of Justice reviewed 10,000 mergers last year. The Secretary also reiterated that the current Merger Guidelines are not binding on the courts or private parties and are subject to change by future administrations.

Secretary Baldrige suggested that rather than seeking repeal of Section 7 of the Clayton Act, the Administration should seek to codify the Merger Guidelines and incorporate in the Clayton Act a monopoly test defining illegal behavior as that which would enable firms to raise prices by a significant amount over a

relatively short period of time. Mr. Ginsburg pointed out that the Department of Justice review of mergers is a statutory requirement.

Secretary Baker suggested that rather than seek major statutory changes in the Clayton Act, the Administration might seek to alter the so-called incipiency test, for example by substituting the word "would" for the word "may" in assessing whether a merger affects competition. The Council discussed the possibility of altering the incipiency test. Several members of the Council suggested that the phrase "dangerous probability" be incorporated into the test.

The Council discussed the dangers of proposing statutory changes in antitrust statutes, including the possibility of creating an opportunity for social interests, rather than economic interests, to be included in merger law. Several members of the Council pointed out that advances in antitrust thinking, emphasizing economic considerations, will not be easily reversed.

Decision

The Council unanimously agreed to:

1. Seek detrebling legislation, as proposed by the Working Group;

2. Alter merger law (Clayton Act) by:

   a. Codifying the enforcement policy currently in the Merger Guidelines;

   b. Eliminate the current incipiency standard and adopt a new standard which tests for a "dangerous probability" (of the exercise of monopoly power); and

   c. Incorporate a monopoly power test as the ability to profitably maintain prices above competitive levels over a significant period of time.

3. Endorse the Working Group's recommendation that the Administration propose antitrust exemptions for mergers and acquisitions in industries injured by imports as alternative relief under Sections 201-203 of the Trade Act of 1974.

4. Endorse the Working Group's recommendation that the Administration propose amendments to Section 8 of the

Clayton Act to exempt certain "safe harbor" de minimis interlocks between competitors and increase to $10 million and index the current $1 million jurisdictional size threshold requiring each interlocked corporation to exceed that threshold before an interlock would be prohibited.